

CERTIFIED FOR PARTIAL PUBLICATION*

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)**

THE PEOPLE,

Plaintiff and Respondent,

v.

RANDHIR SINGH,

Defendant and Appellant.

C043114

(Super. Ct. No. 01F05350)

APPEAL from a judgment of the Superior Court of Sacramento County, Patricia C. Esgro, J. Affirmed in part and reversed in part.

Law Offices of John F. Schuck and John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Senior Assistant Attorney General, Stan Cross, Supervising Deputy Attorney General, and Lee E. Seale, Deputy Attorney General, for Plaintiff and Respondent.

* Pursuant to the California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I, III, IV and V of the Discussion.

In the summer of 2001, defendant Randhir Singh was arrested three times within eight weeks, resulting in an amended information charging him with seven felonies. On July 7, 2001, defendant was found in a hotel room with over 54 grams of methamphetamine and a loaded shotgun. He was charged with possession of methamphetamine with intent to sell (Health & Saf. Code, § 11378 -- count one), possession of methamphetamine while armed with a loaded shotgun (*id.*, § 11370.1, subd. (a) -- count two), and possession of methamphetamine (*id.*, § 11377, subd. (a) -- count three). As to count two, it was further alleged defendant was personally armed with a firearm during the commission of the offense (Pen. Code, § 12022, subd. (c)).

After being released on bail on these charges, two weeks later on July 21, 2001, defendant was found in an office at a car dealership with a large block of methamphetamine, a glass pipe, a scale, and a 40-ounce beer bottle. When police arrived, defendant resisted arrest, fought the officers, and threw the beer bottle at an officer's head. Additional charges were filed against defendant, including possession of methamphetamine with intent to sell (Health & Saf. Code, § 11378 -- count four) and assault with a deadly weapon (Pen. Code, § 245, subd. (c) -- count five). As to each of these counts, it was further alleged that defendant committed these offenses while released from custody pending trial in another matter (Pen. Code, § 12022.1).

Approximately one month later, on August 29, 2001, defendant was met at an apartment by deputy sheriffs. When they

attempted to arrest him, he fought them, throwing punches and kicking them. He was in possession of over 29 grams of methamphetamine. Once again, additional charges were added to the information. Defendant was charged with possession of methamphetamine with intent to sell (Health & Saf. Code, § 11378 -- count six), and felony resisting arrest (Pen. Code, § 69 -- count seven). It was further alleged as to each of these charges that defendant committed these offenses while released from custody pending trial in another matter (Pen. Code, § 12022.1).

Following a jury trial in April 2002, defendant was found guilty as charged. Defendant was sentenced to an aggregate term of nine years eight months in state prison.

On appeal, defendant claims that there is insufficient evidence supporting the convictions stemming from the July 7 possession of methamphetamine with intent to sell (Health & Saf. Code, § 11378 -- count one) and possession of methamphetamine while armed with a loaded shotgun (*id.*, § 11370.1, subd. (a) -- count two), in that there is insufficient evidence he exercised dominion and control over the methamphetamine in the hotel room. As to count two, he also contends there was insufficient evidence he was aware of the presence of the shotgun in the room and that he was personally armed (Pen. Code, § 12022, subd. (c)). Finally, as to the charges stemming from the July 7 arrest, he contends he could not properly be convicted of both the possession of methamphetamine with intent to sell (count

one) and the lesser included offense of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a) -- count three). As to the charges arising from the July 21 arrest, defendant contends there was insufficient evidence showing he intended to use the beer bottle as a deadly weapon (Pen. Code, § 245, subd. (c) -- count five), and that the trial court committed prejudicial error by failing to instruct the jury sua sponte with CALJIC No. 12.42,¹ defining a deadly weapon. We shall reverse the conviction for simple possession of methamphetamine on July 7 (count three), and affirm the judgment in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

On July 7, 2001, Roseville police officers received an anonymous tip that "Antonelli" was selling methamphetamine out of a hotel room. Officers went to the hotel and ultimately arrested Jeffrey Antonelli as he sat inside a parked car in the hotel parking lot.

The officers then went to Antonelli's room and knocked on the door. Luke Garcia let them inside, where they saw two bongs, a digital scale covered with a white powder residue, and a loaded shotgun partially concealed by a pillow on one of the two beds. Defendant was seated on the bed with the shotgun. Between the two beds were two plastic bags filled with

¹ CALJIC No. 12.42 (1998 rev.) (6th ed. 1996) (Jan. 2002 supp.) would have been the operative instruction in this case (hereafter CALJIC No. 12.42).

methamphetamine. In all, approximately 54 grams of methamphetamine were recovered from the hotel room. Defendant was arrested and searched, and the officers found an additional 0.33 grams of methamphetamine on his person.

On July 21, 2001, Sacramento County sheriff's deputies were dispatched to a reported burglary at a car dealership. A janitor led them through the showroom to her boss's office, the door of which was open. Defendant was in the office sitting on a couch with another man sitting across from him. As the deputies entered the room, the defendant was facing them. On the coffee table between the men was a four-inch by six-inch block of methamphetamine, a scale, and a 40-ounce glass beer bottle. Defendant was bent over the methamphetamine holding a glass pipe. Defendant was ordered to stand and put his hands behind his back. Instead, he took the scale and pipe and threw them into the corner.

Defendant lunged toward the methamphetamine, spreading it around the table and stomping it on the ground. Deputy Stacy Jacquith tried to put defendant in a wristlock, but he threw her against the wall. He then continued throwing the methamphetamine on the ground, spreading it around.

Another deputy, Samuel Seo, again ordered defendant to put his hands on his head and he continued to refuse. Deputy Seo struck defendant with his baton two times on his upper legs. Despite these blows, defendant continued spreading the methamphetamine on the ground. Deputy Jaquith again tried to

grab defendant's arm, but could not get control of him. During their struggle, as Deputy Jaquith was holding defendant from behind, defendant grabbed the 40-ounce beer bottle off the table and threw it over his left shoulder at Deputy Jaquith's head. The bottle came "probably within an inch, maybe a little bit less" of hitting her in the head.

Defendant and Deputy Jaquith continued to struggle as he continued to mash the methamphetamine into the floor. As they were rolling around on the ground, amid the broken beer bottle glass and the methamphetamine, defendant was trying to punch Deputy Jaquith.

Ultimately, Deputy Seo told Deputy Jaquith to back up, he drew his gun, pointed it at defendant and told him to get on the ground. Defendant eventually complied with these orders and was arrested. A search of defendant's truck revealed 0.89 grams of methamphetamine.

Approximately one month later, on August 29, 2001, at 10:30 p.m., Sacramento County sheriff's deputies were dispatched to an apartment complex to apprehend defendant. The deputies lawfully entered the apartment and waited inside for defendant. When defendant knocked on the door, the deputies opened it to let him inside. Once defendant realized they were law enforcement officers, he attempted to fight, throwing punches at two of the deputies, and then to flee. Defendant was taken down by the deputies, but continued to resist arrest, kicking one of the deputies in the groin.

During the struggle to arrest defendant, he repeatedly reached into the waistband of his pants. Eventually, he removed two clear plastic bags, containing 29.66 grams of methamphetamine.

DISCUSSION

I

Defendant contends that, as a matter of law, there is insufficient evidence supporting his convictions for the July 7 charges of possession of methamphetamine with intent to sell (Health & Saf. Code, § 11378) and possession of methamphetamine while armed with a loaded shotgun (*id.*, § 11370.1, subd. (a)). Specifically, he claims there was no evidence that he “exercised any dominion or control over the methamphetamine found on the floor in [the] hotel room. Thus, there was no evidence of possession” We disagree.

“The standard of review is well settled: On appeal, we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence that is reasonable, credible and of solid value -- from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] If the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness’s credibility for that of the fact finder. [Citation.]” (*People v. Koontz* (2002) 27 Cal.4th 1041, 1078.)

Possession may be actual or constructive. (*People v. Rogers* (1971) 5 Cal.3d 129, 134.) Constructive possession occurs when the defendant maintains control or the right to control the drugs; it may be imputed when the drugs are found in a place that is immediately accessible to the defendant and subject to his exclusive or joint dominion and control. (*People v. Newman* (1971) 5 Cal.3d 48, 52-53, overruled on other grounds in *People v. Daniels* (1975) 14 Cal.3d 857, 862.) The elements of possession may be established by "circumstantial evidence and any reasonable inferences drawn from such evidence; and neither exclusive possession of the premises nor physical possession of the drug is required." (*People v. Harrington* (1970) 2 Cal.3d 991, 998.)

Here, police had received a tip that Antonelli was selling methamphetamine out of the hotel room. Antonelli was in the parking lot of the hotel and had left defendant and Garcia in his hotel room with 54 grams of methamphetamine, a digital scale, a sawed-off shotgun and ammunition. All of these items were left in plain sight. Defendant was seated on the bed where the shotgun and shotgun shells were located and was facing the two bags of methamphetamine on the floor between the beds.²

² The record does not directly indicate defendant was facing the methamphetamine. However, the evidence is that defendant was seated on the bed nearest the door, with his back to the door, facing the opposite bed. The methamphetamine was on the floor between the beds; accordingly defendant was facing toward the other bed and the methamphetamine.

Contrary to defendant's suggestion that he was simply in the room to purchase methamphetamine, it is highly unlikely Antonelli would have left a significant quantity of methamphetamine, a sawed-off shotgun, and ammunition in his hotel room with someone who was merely a buyer. In fact, it is unlikely he would have left these items with people not knowingly involved in the sales activities. Given the quantity of methamphetamine, its location at defendant's feet, the sawed-off shotgun and ammunition and their location on the same bed with defendant, and the digital scale, it was reasonable for the jury to conclude defendant was in constructive possession of both the methamphetamine and the shotgun.

While others may have had access to the methamphetamine and the shotgun in the hotel room, and the methamphetamine and shotgun may in fact have belonged to Antonelli, there was sufficient evidence of defendant's constructive possession of these items.

II*

Defendant next contends there was insufficient evidence supporting his conviction for possession of methamphetamine while armed with a loaded shotgun (Health & Saf. Code, § 11370.1, subd. (a)), as there is insufficient evidence he was "aware of the presence of the shotgun hidden under the pillow." We disagree. Defendant also challenges this conviction,

* Part II of the Discussion is certified for publication.

claiming the trial court prejudicially "failed to instruct the jury regarding the critical element of knowledge." We are not persuaded that any errors were prejudicial.

Health and Safety Code section 11370.1, subdivision (a), provides, in pertinent part: "[E]very person who unlawfully possesses any amount of a substance containing . . . methamphetamine . . . while armed with a loaded, operable firearm is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years. [¶] As used in this subdivision, 'armed with' means having available for immediate offensive or defensive use."

A. Sufficiency of the Evidence

In reviewing the sufficiency of the evidence, we "draw all inferences in support of the verdict that reasonably can be deduced and must uphold the judgment if, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." (*People v. Estrella* (1995) 31 Cal.App.4th 716, 724-725.) This standard of review is not altered where the People rely primarily on circumstantial evidence. (*People v. Bloyd* (1987) 43 Cal.3d 333, 346-347.)

Defendant overstates the case when he characterizes the gun as "hidden." The shotgun was partially concealed by a pillow. However, the butt end of the gun and a clip with blue shotgun shells were immediately visible and readily identifiable to Officer Edward Rosenbrook upon entering the room. Defendant was

sitting on the same bed on which the shotgun was located. It is a reasonable inference from this evidence, that defendant knew the shotgun was under the pillow. Accordingly, there was substantial evidence to support the finding that defendant knew the gun was under the pillow.³

B. Element of Knowledge

Defendant also claims the instructions erroneously failed to advise the jury that he had to possess methamphetamine while *knowingly* armed with a firearm. On this point we agree with defendant. However, in the circumstances of this case, we find the error harmless.

We have found no published cases specifically addressing the knowledge requirement under Health and Safety Code section 11370.1, subdivision (a), nor has either party cited any. As previously noted, section 11370.1, subdivision (a), defines the term "armed with" as having a firearm "available for immediate offensive or defensive use." The statute does not mention knowledge of the firearm. However, the language of Health and Safety Code section 11370.1, subdivision (a) ("*while armed with a loaded, operable firearm*" [italics added]), is nearly

³ Defendant also contends his conviction in count two under Penal Code section 12022, subdivision (c), is not supported by substantial evidence, relying again on the claim that there was insufficient evidence of his knowledge of the presence of the gun. The evidence detailed here also supports defendant's conviction under Penal Code section 12022, subdivision (c). We believe this discussion adequately addresses defendant's challenge, and will not address it again separately.

identical to that of Penal Code section 12022, subdivision (c) (“personally *armed with* a firearm” [italics added]); accordingly, we use Penal Code section 12022 as an analytical guide.

Unlike Health and Safety Code section 11370.1, Penal Code section 12022 does not contain its own definition of “armed with.” However, it is well settled under Penal Code section 12022, that “[a] defendant is *armed* if the defendant has the specified weapon available for use, either offensively or defensively.” (*People v. Bland* (1995) 10 Cal.4th 991, 997.) The jury instructions for Penal Code section 12022 mirror this language, defining the term “‘armed with a firearm’ [as] *knowingly* to carry a firearm [or have it available] for offensive or defensive use.” (CALJIC Nos. 17.15 (1998 rev.) (6th ed. 1996), 17.16.1 (6th ed. 1996), italics added.)

Despite the nearly identical language of Health and Safety Code section 11370.1, the jury instruction for section 11370.1 (CALJIC No. 12.52 (6th ed. 1996)) does not give the same definition of “armed with.” CALJIC No. 12.52 defines “armed with” as “having available for immediate offensive or defensive use.” We can discern no reason for this omission of the knowledge requirement other than inadvertence and we urge the CALJIC committee to promulgate a new instruction including the knowledge requirement.

Having determined that the trial court erred in failing to instruct the jury that defendant had to *knowingly* have the

firearm available for immediate offensive or defensive use, we turn now to the question of whether such an error was prejudicial. We conclude it was not.

The misdescription or omission of an element of an offense "ordinarily requires reversal of a conviction unless the error was harmless. But, if no rational jury could have found the missing element unproven, the error is harmless beyond a reasonable doubt and the conviction stands. (*Neder v. United States* (1999) 527 U.S. 1, 19 [144 L.Ed.2d 35, 53]; accord, *People v. Flood* (1998) 18 Cal.4th 470, 506.)" (*People v. Ortiz* (2002) 101 Cal.App.4th 410, 416.)

Here, in connection with the July 7 incident, defendant was charged with violating both Health and Safety Code section 11370.1, subdivision (a), and Penal Code section 12022, subdivision (c). The only firearm involved in the July 7 incident was the sawed-off shotgun under the pillow. With respect to the Penal Code section 12022 charge, the jury was properly instructed that "[t]he term 'armed with a firearm' means knowingly to carry a firearm or have it available for offensive or defensive use." (CALJIC No. 17.16.1.) The jury found defendant guilty on this count. Thus, the jury had to have found that defendant knew of the presence of the gun partially covered by the pillow. In light of this finding, no rational jury could have found that defendant was aware of the gun as to the Penal Code section 12022 charge, but not aware of the same gun in the same location on the Health and Safety Code

section 11370.1 charge. Thus, in the specific circumstances of this case, we find the trial court's error -- in failing to instruct the jury that knowledge of the gun's presence was an element of the Health and Safety Code section 11370.1 crime -- was harmless. **(END OF PUBLISHED PART II.)**

III

Defendant next contends he was improperly convicted of the greater offenses of possession of methamphetamine for sale and possession of methamphetamine while armed, and the lesser offense of possession of methamphetamine. The People properly concede that defendant's conviction for simple possession of methamphetamine must be reversed because it is necessarily included in the greater offense of possessing the same substance for sale based on the same evidence. (*People v. Pearson* (1986) 42 Cal.3d 351, 355; *People v. Magana* (1990) 218 Cal.App.3d 951, 954.) We accept this concession and shall reverse the conviction on count three, for possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)).

IV

Defendant also contends there is insufficient evidence that he intended to use the beer bottle as a deadly weapon, and therefore, his conviction for assault with a deadly weapon must be reversed. We disagree.

"The mens rea [for assault with a deadly weapon] is established upon proof the defendant willfully committed an act that by its nature will probably and directly result in injury

to another, i.e., a battery. Although the defendant must intentionally engage in conduct that will likely produce injurious consequences, the prosecution need not prove a specific intent to inflict a particular harm." (*People v. Colantuono* (1994) 7 Cal.4th 206, 214.) "The pivotal question is whether the defendant intended to commit an act likely to result in such physical force, not whether he or she intended a specific harm." (*Id.* at p. 218.)

"As used in [Penal Code] section 245, subdivision (a)(1), a 'deadly weapon' is 'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' [Citation.] Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. [Citations.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.) When used as a club or missile, a beer bottle constitutes a deadly weapon. (*People v. Cordero* (1949) 92 Cal.App.2d 196, 199.)

Here, defendant had been released from custody only a few weeks earlier and was awaiting trial on those charges, when he

was found in an office with a large quantity of methamphetamine. When the police entered the office, he refused to comply with their orders and resisted arrest. He struggled with Deputy Jacquith, and while she was holding on to him, attempting to handcuff him, he picked up a 40-ounce beer bottle and threw it over his shoulder, towards her head.

It was not unreasonable for a jury to infer from this evidence that a 40-ounce beer bottle, thrown over one's shoulder at a deputy's head while struggling with that deputy to resist arrest, is an object "used in such a manner as to be capable of producing and likely to produce, death or great bodily injury." (*People v. Aguilar, supra*, 16 Cal.4th at pp. 1028-1029.) Nor was it unreasonable for the jury to conclude from this evidence that "defendant intended to commit an act likely to result in [the application of] physical force." (*People v. Colantuono, supra*, 7 Cal.4th at p. 218.) Nothing more was required.

V

Defendant's final contention is that the trial court committed prejudicial error by failing to instruct, sua sponte, with CALJIC No. 12.42. He contends that under CALJIC No. 12.42, the jury would have been required to determine that defendant "intended to use the beer bottle as a deadly or dangerous weapon." Again, we disagree.

Here, the jury was instructed with CALJIC No. 9.02 (6th ed. 1996), that "[a] deadly weapon is any object, instrument, or weapon which is used in such a manner as to be capable of

producing, and likely to produce, death or great bodily injury. Great bodily injury refers to significant or substantial bodily injury or damage; it does not refer to trivial or insignificant injury or moderate harm."

By contrast, CALJIC No. 12.42 states, "A deadly [or dangerous] weapon is any weapon, instrument or object that is capable of being used to inflict death or great bodily injury[.] [, and it can be inferred from the evidence, including the attendant circumstances, the time, place, destination of the possessor, [the alteration, if any, of the object from its standard form,] and any other relevant facts, that the possessor intended on that [or those] occasion[s] to use it as a weapon should the circumstances require.] [¶] [It is not necessary that a weapon in fact be used or be visible.]"

The instruction is not applicable here. CALJIC No. 12.42 "guides a jury's determination of whether an object is a deadly weapon in cases when the object has not actually been used as a weapon." (*People v. Seaton* (2001) 26 Cal.4th 598, 665.) It concerns the determination whether an instrument or object in a defendant's *possession* is "capable of being used to inflict death or great bodily injury" and is intended to be used as a weapon "should the circumstances require." (CALJIC No. 12.42.) Thus, CALJIC No. 12.42 has been deemed relevant where the offense charges the defendant with *possession, not actual use*, of a prohibited weapon. (E.g., *People v. Graham* (1969) 71 Cal.2d 303, 327-329 [robbery while *armed* with a dangerous or

deadly weapon], disapproved on other grounds in *People v. Ray* (1975) 14 Cal.3d 20, 32; *People v. Harrison* (1970) 5 Cal.App.3d 602, 607-608 [burglary while armed with a deadly weapon]; *People v. Deane* (1968) 259 Cal.App.2d 82, 89-90 [possession of metal knuckles]; see *People v. Rubalcava* (2000) 23 Cal.4th 322, 329 [carrying concealed weapon].)

Such an instruction is "essential when the questioned object is an innocent-appearing utensil capable of use as a dangerous object" (Use Note to CALJIC No. 12.42 (6th ed. 1996) p. 86) because "if the object is not a weapon per se, but an instrument with ordinary innocent uses, the prosecution must prove that the object was possessed as a weapon." (*People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404.)

In contrast, when the charged offense involves an object that has been used as a weapon, there is no need to instruct the jury whether an otherwise innocent object is a weapon. "[T]he use of such an [innocent seeming] instrument with the intent to resist arrest or detention necessarily encompasses its use or intended use as a weapon." (*People v. Pruett* (1997) 57 Cal.App.4th 77, 86.) Thus, once the object has been used as a weapon, there is no need to define for the jury what constitutes a weapon, although there may be a need to define what is deadly, which was done here pursuant to CALJIC No. 9.02. Accordingly, the trial court did not err in failing to instruct the jury with CALJIC No. 12.42.

DISPOSITION

Defendant's conviction on count three, for violation of Health and Safety Code section 11377, subdivision (a), is reversed. The judgment is otherwise affirmed. The trial court shall prepare an amended abstract of judgment reflecting this disposition and shall forward a certified copy to the Department of Corrections. **(CERTIFIED FOR PARTIAL PUBLICATION)**

_____, BUTZ, J.

We concur:

_____, DAVIS, Acting P. J.

_____, HULL, J.